No. 15292

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORTH AMERICAN AVIATION, INC., a corporation,
Appellant,

vs.

WANDA LEE HUGHES and RANDALL L. HUGHES, a Minor, by his Guardian *ad Litem,* HARRY SUTTON,
Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Preliminary Observations.

An examination of appellees' reply brief has disclosed inaccuracies which are so palpable that appellant must herewith set forth in great detail certain evidence in order that the inaccuracies may be readily discerned and that no injustice shall prevail by reason of these statements.

The importance of the material that follows stems from the fact that there could have been only *two* causes for the crash of the plane; first, some failure in the performance of some part of the plane, and second, some act or contribution on the part of the pilot [R. 600-601]. That the trial court was fully conscious of the latter is indicated throughout the transcript. See page 309, where the court overruled objections with reference to whether or not any of the 18 flights scheduled for December 18, 1953, were permitted to leave the ground in view of the weather con-

ditions. Further indication of the trial court's concept of the probability of pilot error is found in the fact that the trial court *at all times* refused to apply the doctrine of *res ipsa loquitur,* undoubtedly concluding that in the face of a mass of evidence indicating probable pilot error, that under the well settled cases of *Zentz v. Coca-Cola Bottling Co.,* 39 Cal. 2d 436; *Ybarra v. Spangard,* 25 Cal. 2d 486, and others one of the major requirements for the application of the doctrine, to wit, that there be no voluntary act or contribution on the part of Lt. Hughes, had not been fulfilled.

I.

Inaccuracies Reflected in Appellees' Brief.

Space would not permit a detailing of all of the inaccuracies in the appellees' brief. The major ones will be called to the court's attention.

1. "Lt. Hughes Was an Experienced Pilot." (R. B. 4.)

This impression is *vital* to appellees' position since if it appears that the accident may have been due to some act or contribution on the part of the decedent, then *res ipsa loquitur* will not apply. (*Zentz v. Coca-Cola Bottling Co.,* 39 Cal. 2d 436.)

Thus appellees state at page 5 of their brief:

> "First Lieutenant Hughes had *137* hours of *instrument time prior to December 18, 1953* [R. 153]."

Actually the transcript reference cited by appellees in support of their assertion that Hughes had 137 hours of *instrument* time reads as follows [p. 153]:

> "Q. By Mr. Brill: On any of the subsequent sheets on the flight record from May 1953 to December 1953, do you find any reference to the instrument rating? A. Yes. On sheet No. 15, dated

June 1953, Air Force Regulation 60-2 and Air Force Regulation 60-4 requirements waived due to pilot service in F.E.A.F.

It shows total *time* 137 hours, *instrument time 9 hours* and 20 minutes, night flying time 3 hours and 10 minutes, indicating his card had been extended."

IT WILL BE CLEARLY OBSERVED THAT APPELLEES' CONTENTION THAT LT. HUGHES HAD 137 HOURS OF INSTRUMENT TIME (A. B. p. 5 and top of p. 6) IS GROSSLY ERRONEOUS. OBVIOUSLY COUNSEL FAILED TO OBSERVE THE COMMA PRECEDING THE WORDS "INSTRUMENT TIME."

Lt. Hughes was in *no* particular an experienced *instrument pilot,* as appellees wish this court to believe. He was married in 1950 at San Angelo, Texas, where he was *starting* his basic training [R. 103]. He went overseas in 1952 and stayed 10 months [R. 109], returning to Nellis Air Base, where he remained for almost six months until his death in December of 1953. His training apparently commenced in April of 1951 [R. 116] when he was in a "prepping" organization known as the A.T.R.C. [R. 116]. *He was not rated* [R. 117], *i. e.,* not commissioned. "He was *first set up* for training as a pilot" March 22, 1952 [R. 117]. In other words, Lt. Hughes at the time of his death in December of 1953 had been rated a pilot for *less than one year and nine months.* Appellant submits that the total actual *instrument* flight time of Lt. Hughes prior to his death instead of being 137 hours was not over *"9 hours and 45 minutes,* exclusive of hood time and Link trainer time."

At the time he was commissioned in March of 1952, he had a total pilot time (basic training) of 279 hours [R. 117]. There is not a scintilla of evidence that any of this time involved *instrument time.* His remaining flight record is fully set forth in Appendix "A."

In order to maintain a *current white card* it was necessary to have flown instrument time *every month* [R. 152]. He held no instrument certificate for the period August 12, 1953, up to and including the date of his death [R. 154]. The "card was not current. He had not flown the required hours" [R. 155].

He had only had two flights in F86 type aircraft in the *six months period prior to his death,* and [R. 142-145] during that same period had only flown 30 minute instrument time. The balance of this time during the last period was spent in a Lockheed trainer. In the Korean theater he flew only in the F86E, a different *model,* although a jet.

Appellees say at page 5 of the Appellees' Brief:

> "First Lieutenant Hughes had 137 hours of instrument time prior to December 18, 1953 [R. 153]. In this respect, according to appellant's witness, he met the qualifications for holding a green card. This is the only material point because appellant's comments on this subject are intended to discredit the experience of decedent in instrument flight."

It will thus be observed that there is no comparison between the experience of the pilots. Annis 10,000 hours (1500 in F 86s); Smith 7500 with 800 hours in F 86s; Kinkella 5000 hours with 800 to 900 in F 86s, all of whom held *green* cards. Appellees' own witness Harrison testified that the requirement for a green card was *500* hours *actual instrument flight.* Irrespective of the requirements for a *green card,* it is obvious that under no view of the evidence was Lt. Hughes qualified for a green card.

2. The Weather.

Appellee asserts that "the weather conditions were *normal* for the Los Angeles International Airport" (App. B, p. 6).

This is contrary to the evidence. The facts disclosed without conflict are simple: The weather was instrument weather [R. 513]; the flight was in instrument flight—planned as such and cleared as such by the authorities [R. 517];

The plaintiffs' own witness Roman Lemmer testified that the official records indicated *some* type of *weather* [R. 169]; it was of such a character that Hughes could not fly contact, *i. e.,* visual, but was required to fly instruments to the top of the condition, whatever it may have been [R. 170-171]. The witness testified that *on the take-off the pilot had to use instruments.* (That is, the pilot with less than 16 hours of actual instrument flight time.) [R. 172-173.]

Patrick Rogers, plaintiff's witness, standing 300 feet south of accident [R. 179], testified, "Well, I would say as far as flight conditions were concerned, it was *zero* on the west end of the runway" [R. 180]. Although he was practically on top of the scene, he heard an explosion and saw a flash of fire, he could *not* see the plane because of the fog. *All I could hear was metal, and you couldn't see it on account of the fog"* [R. 180]. "You could hear it (airplane) going some place, but you couldn't tell where it was going on account of the fog, you couldn't see it" [R. 182].

Plaintiff's witness Robert E. Callagy was driving a car north on Lincoln Boulevard and was 150-200 yards south of where the runway would have crossed Lincoln Boulevard [R. 185]. There were patches of fog [R. 188].

The appellees' statement is extremely misleading; for example, they say, "visibility was officially fixed at one half mile" (B. p. 6). Obviously this was an observation

made some time before the take-off and the accident. The fog condition which was coming in was *undisputed* by all; it was *rapidly moving* and by the time Lt. Hughes reached the end of the air strip, he was *completely enveloped in the fog.* All witnesses will differ slightly in their testimony. These minor conflicts cannot be determinative of the true facts in the light of the undisputed testimony that the flight was in instrument flight, the pilot filed a flight plan indicating an instrument take-off, the weather was classified as instrument weather [R. 434]. Since there was no evidence of any instrument weather enroute, the only conclusion that can be drawn is that the weather described by the various witnesses was responsible for the scheduling of this flight as an instrument flight. Appellees say in the appendix that Fischer, the Acting Chief Controller at the Air Tower, drew his own conclusions about the reason for the military flight clearance and that weather conditions at the airport were not such as to require him to refuse clearance on instrument flight rules, "or the traffic *would have been greatly reduced*" (App. B, Appendix A, p. 7). Clearly this is inaccurate. This man testified that the visibility was so restricted that "we could just barely see the runway where the aircraft departed, due to the visibility restrictions" [R. 440]. He testified that while the condition was not unusual [R. 444], that it was *not normal.* The key to Fischer's testimony which has been so tortured by appellees is found in the following [R. 444-445]:

> "Q. Well, now, I don't know, but did you mean to imply it was perfectly normal to have only a half mile visibility at Los Angeles International Airport? A. It is not unusual.
>
> Q. It is not unusual, but it is not normal, is it, sir? A. A visibility condition like that is never normal, no.

Q. Is it also not true, sir, that this was an instrument flight clearance? A. That is correct.

Q. And the reason it was instrument flight clearance was because of the conditions? A. The reduced visibility."

This witness further stated that when there is either high fog or low fog that you take off and land with instruments [R. 445].

There is not one word of testimony from which it could be inferred that at the time Lt. Hughes took off, *anyone,* military or otherwise, *would have been permitted to fly by visual rules or contact rules.*

The testimony of other witnesses who testified as to the condition of the weather is set forth in Appendix "B."

In the face of the evidence set forth in Appendix "B" it is difficult for appellant to understand how the appellees can conscientiously claim that the weather conditions were "normal" for the Los Angeles International Airport. It seems to appellant that the matter is settled without conflict by all witnesses, that the weather on the day in question was instrument weather; that the flight in question was an instrument flight. That there was a rolling bank of fog coming in from the ocean is conceded by every witness who testified. While one witness may have been able to see a few feet farther than the other, the fact remains that *for flying purposes,* the weather was instrument weather. With a plane traveling at a take off speed, in excess of 100 mph, it must be quite evident that the fact that a particular witness was able to see a distance of 50 or even several hundred feet is of no importance, and creates no true conflict on the ultimate issue as to the type of weather which was involved.

3. The Statement That "Neither the Instruments nor the Jet Engine Needed to Be Warmed Up" (R. B. 8) Is Misleading.

The assertion is made in appellants' brief that the jet engine did not require a warm-up. Appellant concedes that it is unnecessary to warm up a jet plane, *i.e.,* the motor as is true with the ordinary gasoline combustion type motor. If a visual flight is contemplated, the plane immediately after the motor is started may take off without further ado. The important factor, however, is glossed over by appellees because it goes to the very heart of their case, with reference to the conduct of the decedent insofar as it may have contributed to the crash.

Where the flight is by instrument, the use of a vertical gyro horizon is indispensable. Appellees suggest that all that is necessary is to turn the switches on for five minutes and that the gyros would come to a speed sufficient to give a proper indication on the instrument. Appellant does not so read the testimony of Witness Annis, who testified as follows:

> "Q. Do you, Mr. Annis, make any run up in so far as instruments are concerned? A. In VFR flights, we do not. It requires for proper gyro operation, about five minutes *full power run* to assure yourself that the gyro horizon is operating properly." [R. 455.]

Appellees, would have this court believe that the gyro horizon may have been properly placed in operating order because the switches may have been on for five minutes even though the motor was not running, five minutes before the plane took off. Appellee apparently has overlooked the testimony of G. E. Beaudry, a security officer who was familiar with the decedent and spoke to Lt. Hughes as he proceeded to his ship. He helped decedent buckle

on his parachute [R. 574]. Lt. Hughes then climbed into the cockpit, brought his canopy to the half way mark, started his engine, and after *ten to fifteen* seconds started to taxi down the runway [R. 574]. Obviously this does not indicate any five minute wait, so that the gyro horizon would be permitted to stabilize. However much appellees may gloss over this fact, the undisputed evidence is that Lt. Hughes was *guilty of some degree of fault or contribution,* since he did not in accordance with the uncontradicted evidence, properly stabilize the gyro horizon before taking off on an admitted instrument flight. No matter how appellees present the evidence, there simply is evidence from *no one* which would justify the inference that *5 minutes elapsed between the time Lt. Hughes first got into the plane and the time he actually commenced his take off.* That this instrument must be in proper working order is imperative since it *simulates an artificial horizon so that the pilot can tell where he is going* [R. 518], when he is flying on instruments.

4. "There Was Evidence of Carelessness in the Process of Manufacturing or of Inspecting the Airplane." (R. B. 9.)

Although appellees' entire case was predicated upon the theory of manufacturer's liability there is not one scintilla of evidence to establish any negligence in and about the design or manufacture of the airplane. Even on the motion for a judgment notwithstanding the verdict, appellees' counsel was unable to designate any respect in which the appellant had been negligent in connection with the manufacture of the aircraft [see pp. 870-874].

All appellees have set forth in the reply brief on this point is the suggestion that an inspection of the aircraft prior to delivery showed that at some time in the manufacture of the aircraft, there was a residue of a preparation known as "foamite." From this single notation,

appellees conclude that the mere presence of foamite *might* have been evidence of a fire, which might have affected adversely some portion of the plane, which *might* have failed to pass subsequent inspections. It must be kept in mind that the plane had been test flown on two separate occasions. Obviously there could have been nothing wrong with the electrical system or there would have been some indication of trouble at the time of the original flights. To permit a jury to conclude from this shred of evidence that there was some possible proximate causal connection between the presence of foamite and the ultimate crash of the ship would be to indulge in the rankest type of speculation.

5. "There Is Evidence That There Was a Flame Out, an Explosion in the Air, a Fire in the Air, and Then a Crash." (R. B. 13.)

It was the consensus of opinion of all experts that there had been no flame out. No witness testified that there was a flame out despite the statement on page 14 of the reply brief that "Two witnesses testified that there was a flame out."

As appellees point out, there is probably no way that anyone can possibly reconcile all of the versions of the various witnesses with respect to some of the *minute* details of the incidents that took place on December 18, 1953, at the fog-bound airport. Whether these differences are based upon vantage points, upon the personality of the witnesses, upon faulty observations, upon versions that may have been reconstructed in the mind of the particular witnesses after knowing more about the incident, is hard to tell.

The witness Fred Prill, one of the project engineers, testified that, ". . . but I think just about every aircraft accident, somebody figures they saw it explode"

[R. 748]. Appellant does not deny that there was some type of explosion, but the entire concept of an *in the air explosion* is unsupported by the credible evidence. From the gouge marks that were found after the crash, it is obvious that the airplane hit the ground intact, and that any explosion that took place came thereafter. If there had been an in the air explosion, there is no earthly way that the nose of the plane with the two gasoline tanks on the wing tips, could have come down so that there would have been a crash leaving three gouge marks as were left in this case. The highly inflammable fuel carried in the two tanks clearly accounts for the rupture of the tanks and the explosion and fire. None of the experts examining the wreckage were able to find any evidence of an explosion inside the plane. To a lay witness, unable to visualize the plane clearly in the fog, the precise continuity of events might be easily mistaken. At a speed of 125 to 150 m.p.h., it is quite obvious that when the plane hit, it exploded and bounced into the air and then tore across the highway to its final resting place.

It was sitpulated by appellees that the airplane became air borne and *crashed immediately* after take-off [R. 101]. If it had exploded in *mid air,* the *airplane* would never have crashed—the pieces would merely have fallen to the ground. Actually because of the fog and the location of the various witnesses, *minor* discrepancies appear. Appellant is of course thoroughly familiar with the rules relating to conflicts in the evidence. Illustrative of the type of conflict involved, however, is the testimony of Rogers at page 180, where in one breath he purports to say he saw the plane, give its altitude, and in the next breath say, "You couldn't see it on account of the fog" [R. 180]. Appellate courts have shown an increasing tendency to become slaves to procedural devices which in effect deprive them of their judicial manhood. In *Martin School of Aviation v. Bank of America,* 146 A. C. A. 390,

the court at page 396 bravely attacked the problem and stated:

> "While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court . . . and in determining this question the credibility of courts is not to be deemed commensurate with the facility and vehemence with which a witness swears. It is wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude the judgment. (*Hall v. Osell,* 102 Cal. App. 2d 849, at 853, 228 Pac. 2d 293.)
>
> "While the findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them, such rule has no pertinency where the evidence without conflict clearly establishes the impropriety of the inferences drawn by the court from the uncontroverted facts. (*Estate of Tarrant,* 38 Cal. 2d 42; *Estate of Teed,* 112 Cal. App. 2d 638.)"

6. The Statement That the Trial Judge Did Not Lend Support to Appellants' Contention That There Was No Evidence to Support the Verdict Is Fallacious.

Appellees quote from only a small portion of the colloquy between court and counsel at the time of the motion for a new trial.

The trial court was unable to perceive any evidence of negligence on the part of appellant. Even after the verdict, the trial court stated that he did not know on what theory the jury had determined negligence [R. 878]. He stated very frankly that if he had been trying the case he would not have found for the plaintiff [R. 878]. The court then stated:

> "In my opinion I think that the plaintiff would have to prove more than an accident happened. *In my opinion I think that is all counsel proved, that an accident happened.* You would never have been able to say that because of this or that, say a crash happened because of this, or maybe because of something else." [R. 878.]

Despite the court's belief that the record was devoid of anything other than the mere fact that an accident had occurred, he apparently was of the *mistaken belief* that he did not have the right to substitute his opinion for the jury's opinion. He thereupon erroneously placed the burden of appeal upon the defendant rather than upon the plaintiff [R. 878].

II.

The Doctrine of Res Ipsa Loquitur Is Not Applicable to This Case.

Numerous cases have been decided throughout the country dealing with aircraft, and it has been uniformly held that the doctrine of *res ipsa loquitur* is not applicable to such cases. The few exceptions to this rule almost invariably involve a suit wherein a passenger or the relatives of a deceased passenger is suing a common carrier, or a suit against an airline or a private owner arising by reason of the wrongful death or personal injury of a person on the ground following the crash of a plane, or damage to property as a result of the crash of a plane. Obviously, in any of the types of cases mentioned, the injured plaintiff was not confronted with that portion of the rule of *res ipsa loquitur* which requires that the accident must not have been due to any voluntary act or contribution on the part of the plaintiff. Such is not the case, however, where the action is brought by the heirs of the deceased pilot who is actually in control of the plane and whose conduct may have caused the crash.

Some of these various cases are the following:

Wilson v. Colonial Air Transport (Mass.), 180 N. E. 212;

Herndon v. Gregory (Ark.), 81 S. W. 2d 244;

Smith v. Whitley (N. C.), 27 S. E. 2d 442;

Boulineaux v. City of Knoxville (Tenn. App.), 99 S. W. 2d 557;

Budgett v. Soo Sky Ways (S. D.), 266 S. W. 2d 53;

Deojay v. Lyford (Me.), 29 A. 2d 11;

Towle v. Phillips (Tenn.), 172 S. W. 2d 806;

Cudney v. Mid-Continent Airline (Mo.), 254 S. W. 2d 662;

Davies Flying Serv. v. United States, 114 Fed. Supp. 776.

Appellees dismiss lightly the decisions referred to by appellants in the opening brief, all involving aircraft, particularly the cases of *Williams v. United States,* 218 F. 2d 473; *Morrison v. LeTourneau,* 138 F. 2d 339; and *Cohn v. United Air Lines Transportation Co.,* 17 Fed. Supp. 865. An analysis of these cases, demonstrates that in each case the court was considering an enunciation of the doctrine of *res ipsa loquitur* which was for all practical purposes identical with that which is the law in California.

In the case of *LeJeune v. Collard* (La.), 44 So. 2d 504, the court refused to apply the doctrine, saying, at page 508:

> "The doctrine of res ipsa loquitur has no application in this case because of the fact that the accident might have occurred through the negligence of the pilot, Le Jeune."

It is interesting to note that in this case, and in the case of *Davies Flying Service v. United States,* 114 Fed. Supp. 776,[1] the court in each instance actually had no evidence as to whether or not the conduct of the deceased pilot in fact had anything to do with the fall of the aircraft, or the failure of the mechanism to function properly. The important thing is that the court in each instance recognized the *possibility* that the deceased pilot *could have done something,* negligent or otherwise, which *might have affected* the operation of the plane.

In *Piper v. Henson Flying Service* (Md.), 60 A. 2d 675, the evidence showed that the decedent had been advised to switch over to a second tank before flying. Shortly after the take-off, he crashed and was killed. An examination of the wreckage revealed that the gasoline selector valve was still on the empty tank. Under these circumstances the court refused to apply the doctrine of *res ipsa loquitur.* Obviously there, as here, there was physical evidence which would indicate that the accident may have been due to a voluntary action or contribution on the part of the decedent.

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[1]"Whether the fall was due to the negligence of the pilot or to some functional failure of the essential operating mechanism of the plane . . . or to some other fortuitous event which rendered the pilot helpless, remains an inscrutable mystery. . . . The most that can be said of the evidence is that it presents nothing more than circumstances upon which theories as to the cause of the tragedy may be multiplied, any one of which is as plausible as the other and all of which rest upon mere conjecture."

Davies Flying Service v. United States, 114 Fed. Supp. 776 at 778.

III.

The Evidence Was Clearly Insufficient to Support a Judgment Predicated Upon the Theory of Manufacturer's Liability.

The only circumstantial evidence that is referred to is the presence of foamite on a portion of the electrical system. There is not one scintilla of evidence which would justify the conclusion or reasonable inference that the presence of the foamite had any possible proximate causal connection with the fall of this particular aircraft. There is nothing to indicate the amount of foamite that had been involved, the actual nature of the disturbance which had caused the application of the original foamite, or any of the other circumstances. For all that appears from the record, the foamite may have gotten on the aircraft by reason of a problem which developed in proximity to the ship. There is nothing to indicate that any essential part of the aircraft was affected by any fire, or had anything to do with the ultimate crash of the aircraft. The electrical system was fully checked out. The plane had twice been flown with no indication of any problem in the electrical system. While it is true that circumstantial evidence may of course support a verdict, the evidence must be of such a character that the inferences to be drawn therefrom are *reasonable* under the circumstances. Jurors are not permitted to run wild in their deliberations and to place their verdict solely upon the ground of speculation and conjecture.

Reese v. Smith, 9 Cal. 2d 324, 328;

Wilbur v. Emergency Hosp. Assn., 27 Cal. App. 751;

Puckhaber v. So. Pac., 132 Cal. 363.

When all of the testimony is analyzed, one fact stands out, and that is the utter absence of any evidence to

indicate that the appellant, North American Aviation, Inc., was guilty of any negligent act or omission in connection with the manufacture of the jet aircraft in question. There is no evidence to indicate that the aircraft was not manufactured in strict compliance with the plans and specifications required by the U. S. Army and the contracts and specification plans entered into between the appellant and the U. S. Army. The evidence was uncontradicted that the engine was built by the General Electric Company and all that North American did was to install it in the aircraft [pp. 790-791]. Although the court refused to instruct on *res ipsa loquitur,* a burden was nevertheless placed upon the appellant to attempt to show the process of manufacture of the aircraft. The transcript demonstrates that the trial court was extremely impatient with the defense testimony and practically forced the appellant to conclude at a time when there were still *forty* witnesses under subpoena [R. 795]. Appellees fluff off the recent case of *Spencer v. Beatty Safway Scaffold Co.,* 141 Cal. App. 2d 875, 297 P. 2d 746, with an attempted distinction which is devoid of merit. This is a manufacturer's liability case, the defendant in that case having manufactured a scaffold. There was evidence of negligence in connection with the manufacture of the scaffold. The important thing about the case is that the court was confronted with a problem which was identical to that involved in the instant case. The plaintiff had been seriously injured (paraplegic) at a time when he was in close proximity to the bleacher lid which had been manufactured by the defendant as a part of a set of retractable bleachers. No one saw exactly what the plaintiff did. He had no recollection as to what he did immediately at the moment of the accident. It is obvious that he either fell, or was knocked from the bleacher when the lid fell upon him. The appellate court

(petition for hearing denied by Supreme Court) refused to apply the doctrine of *res ipsa loquitur* as a matter of law.

The court points out, "That defendant's negligence could *possibly* have been the cause is not sufficient."

It is small wonder that appellees practically ignore this crucial decision, since it is absolutely contrary to their position, both on the main proposition of the manufacturer's liability, and on the proposition of *res ipsa loquitur.*

The two big factors in the cause of a plane crash are failure of the plane itself or *something that the pilot did* [R. 601].

No one of course can tell us what Lt. Hughes actually did. We know now that we are talking about a man who after receiving his basic training had been flying for less than two years; who had practically no flying time in the F 86 F model plane; who had no instrument time *at all* in an F 86 F; who had not flown enough instrument time to keep his white card current at the time of his demise; who had flown no instrument time *at all* between September 28, 1953, and December 18, 1953,[2] that the particular flight was in instrument flight, *in instrument weather,* under conditions which have been responsible for many Air Force accidents.[3] Why this young man was sent on this particular mission by the Army authorities under the circumstances is an inscrutable mystery. Certainly, however,

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[2]Thus Harrison, appellees' witness, testified: His logs do not indicate from September 28, 1953 until the close of his log book that he had flown any instrument time. [R. 156.]

[3]Thus Pilot Frank Smith testified [R. 516-517]: "Q. Well, it is then necessary and proper to use instruments in going through that fog bank? A. It is entirely required. In the Air Force, our worst possible accident-involving condition is caused by pilots trying to fly visual flight rules under instrument flight rule conditions, where the pilot is actually trying to maintain contact with the ground when the conditions do not warrant such a thng. The Court: This was an instrument flight, wasn't it? The Witness: This was an instrument flight."

North American Aviation should not be penalized for any mistake the Army may have made in clearing Lt. Hughes in utter violation of its own regulations.

The fact remains that the Army for reasons of its own, whether due to some mistake in some branch of the Air Force, directed Lt. Hughes to fly the aircraft in question when the Army knew or should have known that Lt. Hughes was poorly qualified to handle this particular jet aircraft, and when they knew or should have known that his white card was not current and that he never did have a green card, and that his experience in jet aircraft had been extremely limited. Certainly appellant should not be penalized for some failure on the part of Army personnel to make certain that the very expensive, highly complicated jet aircraft, capable of speeds in excess of the speed of sound, was not placed in the hands of a young man, who after receiving his student training, had flown airplanes for less than two years. Appellees have completely missed the point of appellant's brief, when certain acts of the pilot were characterized by being possibly *non-negligent*. By this, appellant merely meant that there were certain acts that Lt. Hughes could have done which no one could characterize as being negligent and yet which could have been responsible for the crash of the plane. The concept of any voluntary act or contribution on the part of the plaintiff as a pre-requisite to the application of the doctrine of *res ipsa loquitur,* does not necessarily involve negligent conduct.

The many respects in which the pilot could have been guilty of both negligent and non-negligent conduct were fully set forth in the opening brief and no attempt will be made to repeat them here (see Op. Br. pp. 18-20).

It was pointed out in the opening brief that after the crash it was determined that the trim actuator was improperly set. *This evidence was uncontradicted.* There was evidence that the trim actuator is a *sturdy instrument*

and that the impact would not have affected the setting. This fact alone was sufficient to justify the conclusion that some conduct on the part of Lt. Hughes, whether through ignorance or otherwise, may have contributed to the crash. The testimony of the witnesses was uncontradicted that a failure to properly trim the ship under these circumstances would cause the nose of the ship to go down if the pilot even momentarily released his hand from the stick [R. 741]. The pilot's inexperience in the handling of this type of aircraft may well have accounted for his failure to properly trim the ship.

The hazard of the particular take off involved in this case with the transition of visual to instrument flight, with the failure to adequately warm up the gyro horizon mechanism, with the trim actuator being improperly set, with the possibility that the pilot, through inexperience in this plane and in weather of this type, had failed to control the ship, with the possibility that the pilot may have fainted, or have mistakenly hit one of the switches, or caused a throttle burst, or have done any one of a number of acts which might have affected the operation of the plane, all eliminate the conduct on the part of the defendant as indicating any greater probability of negligence than some negligent conduct or some conduct on the part of Lt. Hughes.

There is just as much reason to believe that if there was a flame out, that it was induced by the pilot, who obviously is in control of the throttle, the switches and all of the other controlling apparatus of the plane. The fact that the airplane was traveling at practically full throttle and was operating at a high rpm at the time of the accident would seem to appellant to eliminate the claim of a flame out in any event [see R. 666, 667, 672, 716-718].

In the very recent case of *Simmons v. Rhodes and Jamison,* 46 Cal. 2d 190, 293 P. 2d 26, the doctrine of *res ipsa*

loquitur was held not applicable where the plaintiff did not eliminate his own conduct as being a causative factor in the ultimate result. The Supreme Court of California stated as follows:

> "The doctrine of res ipsa loquitur was not held applicable for the reason that when a plaintiff seeks recovery upon the theory that a commodity contains a foreign substance and admits that he added material to that delivered by defendant, plaintiff must affirmatively show that the substance he added did not cause the injury. *Zentz v. Coca Cola Bottling Co.,* 39 Cal. 2d 436.
>
> "Plaintiff may properly rely upon the doctrine of res ipsa loquitur even though he has participated in the events leading to the accident, if the evidence *excludes his conduct as the responsible cause.* . . . In the case at bar, plaintiff did not offer any evidence to show that the water he had added to the cement had no effect."
>
> *Simmons v. Rhodes & Jamison,* 46 Cal. 2d 190 at 203.

In *Burr v. Sherwin-Williams Co.,* 42 Cal. 2d 682, the Supreme Court, in refusing to apply the doctrine of *res ipsa loquitur,* states:

> "The fact that an accident occurred after the defendant relinquishes control of the instrumentality which causes the accident, does not preclude application of the doctrine provided there is evidence that the instrumentality had not been improperly handled or its condition otherwise changed after control was relinquished by the defendant."

The burden of proving that the instrumentality has not been improperly handled is not a burden which rests upon the defendant manufacturer, but is a burden which rests

upon the plaintiff. In attempting to show that the instrumentality has not been improperly handled or its condition changed, or that the conduct of the plaintiff did not in some fashion contribute to the accident, the plaintiff is not entitled to rely upon the presumption of due care.

Spencer v. Beatty Safway Scaffold Co., 141 Cal. App. 2d 875 (petition for hearing denied by Supreme Court, 1956 case).

See also:

Danner v. Atkins (1956), 47 A. C. 333;
Barrera v. De La Torre, 48 A. C. 146.

Conclusion.

It is respectfully submitted that the judgment should be reversed. It is only by resort to the rankest type of speculation and conjecture that this court can sustain the judgment. To do so in the face of the uncontradicted evidence, would emasculate the requirements for the application of the doctrine of *res ipsa loquitur* as laid down by the Supreme Court of the State of California. Where the record is replete with evidence that the conduct of the decedent may have contributed or caused the crash of the plane and where the appellees have not introduced any evidence to indicate that the accident was not due to any voluntary act or contribution on the part of Lt. Hughes.

Respectfully submitted,

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APPENDIX "A."

LT. HUGHES' FLIGHT RECORD [R. 148]

	Cumulative totals
1. Basic training, i.e., student pilot [R. 130], completed 3-22-1952,	279 hrs.
2. April 1952 Total April flight time, 14 hrs. consisting of 8 hrs. contact, 3 hrs. hood[1] and 3 hrs. *actual* instrument [R. 118]	293
3. May 1952 Total May flight time, 26 hrs., consisting of 7 hrs. hood, 19 hrs. contact. *No actual* instrument time [R. 120]	319
4. June 1952 During this month Lt. Hughes had 5 hours of Link trainer[2] time, 2 hrs. and 20 min. *actual* instrument flight [R. 122]	325
5. July 1952 25 hrs.—no *actual* instrument, but apparently 5 hrs. Link trainer time [R. 124]	350

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[1]Hood time. This is simulated instrument flying where the pilot is under a hood using instruments. No visual reference is made to the ground. *Someone else* is obviously along. [R. 120.]

[2]Link trainer time. Plaintiffs' witness Ross Harrison describes the Link trainer as follows: "A link trainer is an airplane . . . a *model* one . . . the pilot gets in . . . and has instruments, but his control of the stick and the rudder simulate instrument flying and he must control it. There is a graph over here that records just what he is doing. . . . [R. 121.] It is a fixed instrument and does *not* leave the ground." [R. 122.]

6. August

As of the end of Aug. 1952, Lt. Hughes had flown only "3 hrs. weather instrument, which is actual instrument . . ." [R. 126] and 10 hrs. of hood or simulated flying. Of the total time of 382 hours only 103 hrs. was jet propulsion [R. 126] 382

7. September 1952

Lt. Hughes logged only 2 hrs. of flying time during Sept. 1952 [R. 130] 384

8. October 1952

No instrument flying [R. 130]

9. November 1952

Oct. and Nov. 11 hours total flying time [R. 130] 395 [R. 133]

(First indication of *combat* time —obvious, though that *training* continued. See R. 131. Combat time was likewise broken down in the log between contact and visual [R. 133]. No instrument flying in either Oct. or Nov.

10. December 1952 (1 year before death)

35 hours total visual [R. 133] No instrument flight in Dec. 1952 430 [R. 134]

11. January 1953

23 hrs. total flying time. Of this there was 1 hr. instrument flying and 30 min. hood time 453 [R. 135]

12. February 1953

    26 hrs. total flying time, of which there was 1 hr. instrument flying [R. 135] 479 [R. 136]

13. March 1953

    23 hrs. total flying time. Of this, approx. 45 min. was actual instrument flying [R. 137] 502 [R. 137]

14. April 1953

    17 hrs. total flying time, of which 30 min. was hood time [R. 137] 519 [R. 138] Lt. Hughes was suspended from flying status on 4-19-53 for physical reasons not disclosed [R. 138]

15. May 1953 and June 1953

    Separate totals were not available for the months of May and June, but it is obvious that the total flying time for these 2 months was 54 hours. Of this time, only 2 hrs. and 50 min. was actual instrument flying during May [R. 139-140.] During June, Lt. Hughes had only 20 min. actual instrument flying time [R. 142] 573 [R. 143]

16. July 1953

    There is no record of any flying between June 18, 1953 and August 12 when Lt. Hughes resumed duty [R. 143-144]. Apparently, however, between June and July, he flew a total of 10 hrs., *none* of which was instrument time 583 [R. 144]

17. August 1953

This is the key to *entire picture* [R. 144]. At this time, a mere *three* months before his death, Lt. Hughes' record was as follows [R. 144]: "His total first pilot time is 296 hours and 40 minutes. His instrument time is *11 hrs.,* night time is 9 hrs., 15 hrs. under the hood (which is simulated instrument) which brings his total time to 583 hours and 15 minutes."

In other words, Lt. Hughes, 3½ months before his death, had only 11 hours of *actual instrument time* [R. 144].

18. September 1953

Lt. Hughes had *no instrument time during September.*

19. October 1953

No instrument time.

Lt Hughes' total flying time for September and October was only 19 hrs. and 45 min., with no instrument time, actual or simulated 602.45 [R. 145]

20. November 1953

Flying time 17 hrs., of which 4 hrs. was hood time and 30 min. was actual instrument flying 619.30 [R. 146]

21. December 1953

Flying time in Dec. to time of death on Dec. 18, 1953, was 8

hrs. and 30 minutes, and no instrument time was logged during this period	627	[R. 146]
From the foregoing recapitulation we learn that Lt. Hughes at the time of his death had a total flying time of	627 hrs.	[R. 147]
Of this, student training time was	279	[R. 148]
Flying time exlusive of training time as a student	348 hrs.	

Thus we observe that other than time spent as a student, Lt. Hughes had only *348* hours of flight time. Of this total of 627 hours there was the following:

1.	Actual instrument time	11 hrs. 45 min.
2.	Link trainer time	10 hrs.
3.	Hood time	15 hrs. 30 min.

His total time spent in training and flying with instruments, *including* Link trainer time, where the device never leaves the ground, was less than *36 hours.*

APPENDIX "B."

A. John Ross Rinaldi. This witness actually saw the ship in question go into the fog bank and disappear from sight [R. 423].

B. John C. Bryan, who was in charge of the test flight schedule. There were 18 test flights booked for the day in question, but *all* of them were cancelled because of the weather conditions [R. 307]. This testimony was not based merely upon this man's recollection, but upon records which were made at the time, and which disclosed weather conditions [R. 308]. Even the trial court recognized the importance of the weather problem when it overruled an objection to a certain phase of this witness's testimony. The court stated at page 309: "The defendants say there was contributory negligence on the part of the operator of the plane. The question of the weather and the field on that particular day may be very important as to whether it was proper to take a plane off the field at that particular time."

C. Richard B. Gottschald testified that the weather at the time of the accident was foggy. The fog was low to the ground, particularly at the west end of the runway [R. 285].

D. Witness Frank Smith, a veteran pilot, saw the aircraft on take off. The take off appeared to be ordinary with the exception of the fact that "we felt it was rather strange he should be taking off in adverse weather conditions" [R. 513]. At that time Bryan had called off flying for the day. An official report showed ½-mile visibility due to the obscuration, but according to Smith, the weather at the moment of take off was worse than that [R. 513]. He described it as follows: ". . . There was a fog bank, which is common and not too normal to the Los Angeles area, was inland from the shore, being partially over the western end of the airport,

a very low, dense fog bank. Q. Did that come down to the ground? A. It did. Q. Was it a condition of weather that would require the use of instruments? A. *It was, very definitely."*

The importance of the instrument take-off as compared to the visual flight rules and the misleading situation that may exist where a fog is rolling in, and there is at the start of the runway relatively clear weather, with the plane taking off into the rapidly incoming fog, is fully described by Pilot Smith on pages 514 and 515. As he pointed out, this type of fighter aircraft is *very sensitive* to control pressure on the stick. One of the worst possible accident-involving conditions is caused by pilots attempting to fly visual in a restricted situation, or the *transition* between a visual situation and an instrument situation [R. 516-517]. In other words, if there is an actual weather condition, and no element of visual contact, i.e., a true instrument flight, there is no transition, but where, as here, there was some visibility, but with a transition into a rapidly moving and approaching fog bank, there is a reaction that may get the pilot in trouble.

Obviously from this testimony, *lack of instrument flying experience or flying experience under the conditions as prevailed on the day in question, could easily account for a failure on the part of the pilot to properly control the ship.*

E. Joseph Kinkella testified that he was driving north on Lincoln Boulevard. He did not see the crash of the plane. He estimated that visibility was extremely limited due to what he described as a dense fog [R. 537]. This man had approximately 5,000 hours of flying time, of which 800 to 900 hours was logged in F 86 jets [R. 534]. This pilot likewise pointed up the possibility that the pilot may have attempted to maintain visual contact until the last minute. He stated, ". . . It is most difficult for even a most experienced pilot, say with 3,000 to 4,000

hours of time, and lots of instrument time, to make the transition to instrument flying smoothly, and just when you are taking off, you are going to have to make it very smoothly, because a very small movement of the stick might mean a couple of hundred feet, and you just wouldn't have that kind of altitude right on take off [R. 542]. More important, however, is Kinkella's statement that in order for a man to take off in weather of a type involved on the day in question, he should be *"current on instruments."* He should have flown instruments lately at altitude in this type of aircraft. I would say, to make an instrument take off of that type, he should have at least *5* hours of instrument time in the *last two or three months* [R. 544].

The only reasonable inference that can be drawn from the foregoing, and there is none in the record to the contrary, from any witness, is that instrument flying is not something which a person learns and then is required to no longer practice, but is a skill which requires *constant attention,* thus the requirment that in order to hold the white card current. the pilot must fly a specified number of hours per month.

F. Charles Edward Kunzler. This man testified that he was the operator of a crash truck, was thoroughly familiar with the flight of airplanes and take offs and actually observed the take off in question. He saw it disappear into a fog bank. "It was just like a wall of fog that came in at the end of the runway." [R. 557.] After the aircraft entered the fog bank he could not see it at all.

G. G. E. Beaudry, a guard at the airport, watched the aircraft take off and observed that it went into a fog bank after he was approximately 20 to 25 feet in the air, after which he could not see him at all [R. 575].

H. William Pitts testified that he likewise observed the plane go out of sight into the fog bank [R. 640].